

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHRISTIAAN VAN COLLER¹
Claimant

VS.

MASSIEON FARMS HARVESTING, INC.
Respondent

AND

STAR INSURANCE COMPANY
Insurance Carrier

Docket No. 1,062,045

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 24, 2013 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 23, 2013. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent.

The ALJ found claimant entitled to compensation benefits as he has suffered a functional impairment of 17.5 percent to the body as a whole. Although Dr. Palmgren submitted an affidavit stating claimant's only injury was to the shoulder, the ALJ found "the clinical diagnoses by Dr. Prostic and Dr. Stein of impairment to be credible."² Additionally, the ALJ found claimant sustained a permanent partial disability of 68.87 percent, a wage loss of 61 percent, and a task loss of 79.75 percent. Because claimant decided to forego additional medical care at the time of the Award, the ALJ had no alternative but to find claimant at maximum medical improvement. However, the ALJ found future medical treatment should remain open upon application and review as two board certified orthopedic physicians testified claimant requires additional testing and possible treatment.

¹ The record contains two spellings of claimant's name. The above spelling was adopted because it appears thus on claimant's visa, passport, and other immigration documentation.

² ALJ Award (April 24, 2013) at 5.

The Board has considered the record and adopted the stipulations listed in the Award.³

ISSUES

The respondent argues claimant is not entitled to permanent partial general disability compensation (work disability) as he has nothing more than a scheduled injury. Respondent maintains that additionally, claimant is not entitled to a work disability as he does not meet the requirements as stated in K.S.A. 2011 Supp. 44-510e. Respondent argues claimant does not have the requisite wage loss nor the legal capacity to be eligible for a work disability.

Claimant contends the ALJ's award should be affirmed as he has met his burden of proving permanent injuries resulting in a general body disability and functional impairment. Claimant further argues the undisputed evidence establishes that it is more probable than not he will need future medical treatment for his injury.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future and unauthorized medical care?

FINDINGS OF FACT

Claimant, a South African citizen, worked for respondent as a diesel mechanic and truck driver during the agricultural seasons (June through November) of 2010 and 2011 in Wamego, Kansas. Claimant worked for respondent on a U.S. work visa⁴ for six months of the year and worked the remaining six months in South Africa as a diesel mechanic. Claimant is a certified diesel mechanic with an expired CDL. Claimant testified his CDL expired when his work visa expired on November 10, 2011.⁵

³ Due to clerical error, the temporary total compensation rate in Stipulation No. 7 of the ALJ's Award incorrectly reads as \$503.00 per week. The correct rate is \$500.03 per week.

⁴ Specifically, an H-2A agricultural worker visa, which is a seasonal work visa.

⁵ Claimant's work visa expiration date is sometimes noted as November 15, 2011 in the record. The actual work visa shows the expiration date as November 10, 2011.

On September 11, 2011, claimant was underneath a corn cutter performing routine maintenance when the 4.5 ton header of the machine was lowered onto him.⁶ Claimant was consequently pushed into the soft ground and suffered a broken right shoulder, broken ribs, a punctured lung, and a hemorrhage to the right eye.

Claimant was taken to the emergency room at Washington County Hospital, where he remained for three days. While at the hospital, claimant was diagnosed with a right fifth rib fracture, right acromioclavicular (AC) separation, and a small pneumothorax/pleural effusion. Claimant was then treated by Dr. Cassie Scriptor at the Cotton-O'Neil Clinic in Wamego. Dr. Scriptor prescribed pain medication and referred claimant for orthopedic care.

Dr. Bryce A. Palmgren, a board certified orthopedic surgeon, initially examined claimant at the request of Dr. Scriptor on October 4, 2011. Claimant initially presented with a rib fracture and right shoulder pain. Dr. Palmgren testified his main area of focus was claimant's right shoulder. He further stated that aside from claimant's right shoulder and the rib fracture reported in claimant's medical records, he was unaware of any other injuries. Dr. Palmgren diagnosed claimant with a right shoulder grade 2 AC separation and recommended conservative treatment, including physical therapy, although he did not dismiss the possibility of surgery should claimant's pain and problems continue.

On November 16, 2011, claimant underwent reconstructive surgery with Dr. Palmgren on his right shoulder for a right grade 3 AC separation. Dr. Palmgren testified he performed a distal clavicle excision on claimant but denied the procedure was a specific distal clavicle arthroplasty. He explained, "That's a specific procedure for a specific reason, and that is not included as part, to me, as part of the AC reconstruction."⁷

Claimant continued with physical therapy and followed up with Dr. Palmgren multiple times following his surgery. Claimant continued to have pain and decreased range of motion in his shoulder, causing Dr. Palmgren to order an MRI in an attempt to determine the pain source. An MRI dated February 1, 2012, showed a periarticular edema around the acromioclavicular joint and in the anterior subacromial space, "presumably due to recent surgery."⁸ Otherwise, the MRI was unremarkable.

Claimant's right shoulder problems continued and Dr. Palmgren performed a right shoulder manipulation under anesthesia with subacromial steroid to address claimant's frozen shoulder on April 12, 2012. Following this procedure, claimant continued with

⁶ The parties stipulated the date of accident is September 11, 2011. At times the date of accident is noted in the record as September 9, 2011.

⁷ Palmgren Depo. at 17.

⁸ *Id.*, Ex. 2 at 10.

physical therapy and a home exercise plan. Dr. Palmgren imposed the following permanent restrictions: lifting, pushing, and pulling limited to 20 pounds and no operating heavy equipment.

Dr. Palmgren last evaluated claimant on May 23, 2012, at which time he performed the range of motion finding utilized in his final impairment rating. In a letter dated July 24, 2012, Dr. Palmgren noted claimant was at maximum medical improvement. Using the *AMA Guides*,⁹ Dr. Palmgren rated claimant with a permanent partial impairment of 20 percent to the right upper extremity as a result of the injury of September 11, 2011.¹⁰

Dr. Paul Stein, a board certified neurosurgeon, examined claimant at his counsel's request on September 13, 2012. Claimant presented with pain in the right shoulder and to the right of the sternum and right lateral upper chest wall. He also complained of intermittent shortness of breath and intermittent numbness and tingling into the right third, fourth, and fifth fingers. Claimant told Dr. Stein there was no prior history of injury to his right shoulder, chest wall, and right hand or injuries after the date of the accident.

After conducting a physical examination and reviewing claimant's complete medical records, Dr. Stein determined claimant would not be able to engage in his previous occupation of motor vehicle mechanic. He further determined the prevailing cause for all of the areas of claimant's symptomatology was the work incident of September 11, 2011. Dr. Stein testified the accident described by claimant was consistent with the injuries diagnosed and the assigned functional impairment.

In relation to claimant's right shoulder, Dr. Stein noted claimant's ongoing pain could be secondary to soft tissue injury. He indicated maximum medical improvement had been reached absent additional investigation or treatment. Dr. Stein recommended claimant obtain an MRI-Arthrogram of the right shoulder and a consultation with Dr. Daniel Prohaska. Further, Dr. Stein recommended the following permanent restrictions: no lifting more than 15 pounds up to chest level very occasionally, 12 pounds occasionally, and avoid repetitive lifting; no activity with the right hand above shoulder level or more than 24 inches from the body; no activity with the right hand behind the plane of the body; and no activity requiring unusual positions of the right upper extremity or those which place stress on the right shoulder. Using the *AMA Guides*, Dr. Stein rated claimant with an 11 percent upper extremity impairment at the level of the shoulder, which translates into a 7 percent whole person impairment.

⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹⁰ Dr. Palmgren submitted an Affidavit to the Court dated February 18, 2013, after reviewing the later medical records of Dr. Prostic. In said Affidavit he states the records do not change his opinion and conclusions; specifically that claimant suffered permanent injury causally related to the work injury claim and to no other part of the body than the right shoulder.

Dr. Stein recommended a pulmonary function assessment to establish the presence or absence of functional impairment related to claimant's persistent complaints of breath shortness. He indicated he was unable to provide an impairment rating or restrictions without the assessment.

Dr. Stein recommended a CT scan of the sternum and its articulation with the ribs to determine if there had been a separation between the sternum and the rib cage, or possibly a fracture. He noted, "Absent such information, on a clinical basis, using the chapter on pain from the *AMA Guides*, 2 [percent] impairment is assessed to the body as a whole."¹¹ Dr. Stein testified this impairment is based upon a complaint of pain, which is a subjective finding. He further stated tenderness was the only objective finding from claimant to support a functional impairment assignment to the sternum.

Dr. Stein tested claimant's right hand numbness with two point discrimination and recommended an EMG/NCT of the right upper extremity and an MRI scan of the cervical spine to determine the cause of claimant's numbness. Dr. Stein indicated these tests would be necessary for a diagnosis from which permanent impairment of function could be assessed. He further noted that clinically the most likely source of claimant's hand numbness is ulnar nerve injury or entrapment. Based on this assumption, Dr. Stein assessed claimant with a 20 percent impairment to the right upper extremity, which translates into a 12 percent impairment to the body as a whole.

Combining his ratings to claimant's right shoulder, right upper extremity, and sternum, Dr. Stein assessed claimant with a 20 percent impairment to the body as a whole.

Dr. Edward Prostic, a board certified orthopedic surgeon, performed a court-appointed independent medical examination of claimant on November 26, 2012. Dr. Prostic noted the area of greatest concern was claimant's chest. Claimant complained of a constriction feeling with shortness of breath and pain and popping about the sternum. Claimant indicated he continued to take medication for fluid accumulation in his chest. He further complained of shoulder pain and inability to sleep on his right side, with tingling to the long, ring, and little fingers of the right hand.

Dr. Prostic conducted a physical examination and reviewed claimant's medical records. He noted claimant's significant distress about the shoulder may be from instability and/or rotator cuff injury and recommended an MRI of the shoulder and an EMG of the right upper extremity. Dr. Prostic testified claimant had signs of rotator cuff dysfunction, but he had not had an MRI or arthrogram to determine whether he has a torn rotator cuff or just weakness of muscles from disuse, perhaps from a neurologic injury.

¹¹ Stein Depo., Ex. 2 at 5.

Dr. Prostic noted in his report that “at this time, it is unclear whether [claimant’s] ulnar nerve symptoms are from brachial plexus injury, thoracic outlet syndrome, or cubital tunnel syndrome. As these symptoms are not worsened during physical examination, it is suspected they are from permanent brachial plexus injury.”¹² Dr. Prostic testified claimant has ulnar nerve symptoms but no positive physical findings of ulnar nerve dysfunction. He further agreed it was a fair characterization that he is not stating within a reasonable degree of medical probability that claimant has thoracic outlet syndrome because his report notes the findings are unclear and based on suspicions.

Dr. Prostic stated claimant was unable to return to work beyond the restrictions of Dr. Palmgren.

Based on the *AMA Guides*, Dr. Prostic noted “if surgically correctable problems are not noted on [an] MRI of the shoulder or EMG, permanent partial impairment is rated at 15 [percent] of the body as a whole for problems about the chest, brachial plexus, and shoulder.”¹³ Dr. Prostic testified he was unable to give a separate functional impairment rating for claimant relating only to the shoulder as some of claimant’s impairment may be duplicative:

If he does have a brachial plexus injury, then some of the atrophy and weakness may be from that.

. . .

If a surgically correctable problem is not found, then I believe he has a 15 percent permanent partial impairment of the body as a whole. If a surgically correctable problem is found, then it ought to be corrected, and if it’s not, I might raise his rating a bit.

. . .

Until the tests are done, we won’t know whether or not there’s a surgically correctable problem.¹⁴

Dr. Prostic testified his impairment rating is within a reasonable degree of medical probability, even though he states the source of claimant’s ulnar nerve symptoms are unclear. Further, based upon the available information, Dr. Prostic stated the 15 percent impairment rating is his best judgment.

¹² Prostic IME (Nov. 26, 2012) at 3.

¹³ *Id.*

¹⁴ Prostic Depo. at 5-6.

Robert Barnett, Ph.D., a clinical psychologist and rehabilitation counselor, evaluated claimant's task and wage loss at the request of claimant's counsel on October 6, 2012. Dr. Barnett identified 17 unduplicated tasks claimant performed prior to his injury. Steven Benjamin, a certified vocational rehabilitation counselor, also evaluated claimant's task and wage loss at the request of respondent's counsel on January 31, 2013. Mr. Benjamin determined claimant performed 37 unduplicated tasks in the course of his work history.

Of the 17 unduplicated tasks on Dr. Barnett's list, Dr. Stein opined claimant was unable to perform 15 for an 88 percent task loss. Dr. Stein testified he was unsure if there was minimal reaching in Task No. 2 of Dr. Barnett's list ("operate stake truck"), and if it became apparent only minimal reaching was required he would alter his opinion to 14 out of 17 unduplicated tasks for an 82 percent task loss. This issue was never clarified by claimant.

The parties stipulated that Dr. Prostic's task loss opinion is 85 percent based on Dr. Barnett's task list and 70 percent based on Mr. Benjamin's task list.

Claimant's stipulated average weekly wage was \$955.39. Dr. Barnett opined claimant could reliably earn \$290 per week with his current restrictions for a wage loss of 70 percent. Dr. Barnett later revised his opinion following further research and determined claimant was incapable of earning a wage in any gainful employment due to his restrictions for a wage loss of 100 percent. Mr. Benjamin determined claimant had a current earning capability of \$468.32 per week for a wage loss of 51 percent. Both vocational experts agreed that should claimant be unable to legally work in the United States, his capacity to earn a wage is 0 for a 100 percent wage loss.

Claimant's work visa expired on November 10, 2011, a date set when the work visa is first issued. Jennifer Ananda, claimant's immigration attorney, testified claimant's work visa would have expired on its expiration date regardless of whether he suffered an on-the-job accident. Claimant's medical treatment continued past the work visa expiration date.

As a South African citizen, claimant must have a valid visa to remain in the United States. Ms. Ananda testified claimant had applied for an extension to his visitor's visa, the pending application allowing him to remain in the country until a decision is reached. She further noted claimant does not have a current work visa as he does not have an employer. A potential non-immigrant worker must have employment and be sponsored by said employer before qualifying for a work visa. It is Ms. Ananda's understanding that any prospective employer that meets the requirements with the government may file a petition on behalf of a temporary worker/non-immigrant petitioner.

Respondent is unable to accommodate claimant due to his permanent restrictions. Claimant has not worked since the accident of September 11, 2011.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-510e(a)(2)(C) states:

An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

K.S.A. 2011 Supp. 44-510e(a)(2)(E)(i) states, in part:

To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment.

ANALYSIS

1. What is the nature and extent of claimant's disability?

The first issue that must be addressed is: does claimant have the legal capacity to enter into a valid contract of employment? If not, claimant cannot establish that he experiences a wage loss of at least 10 percent, which is required to obtain work disability.

Claimant was in this country on a temporary agricultural visa pursuant to 8 U.S.C.A. § 1188. 8 U.S.C.A. § 1324a, states, in part:

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity--

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as

defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

Claimant's work visa expired on November 10, 2011. Claimant no longer has the legal right to contract for employment without a new or renewed work visa. It is illegal for employers in the United States to hire claimant due to his current unauthorized status.

Simply put, claimant cannot legally contract for employment, notwithstanding his presence within the borders of the United States. As such, claimant cannot prove a post-injury wage loss and is not entitled to work disability under K.S.A. 2011 Supp. 44-510e.

Claimant is entitled to a functional impairment. Dr. Prostic, the court ordered examiner, assessed a 15 percent impairment rating for injuries to the chest, brachial plexus, and shoulder. Dr. Prostic did a poor job of breaking down the specific assignment of the impairment rating to the individual body parts. Dr. Prostic stated that he was unclear whether the ulnar nerve symptoms were from a brachial plexus injury, thoracic outlet syndrome or cubital tunnel syndrome. Dr. Prostic was unable to separate out the amount impairment due to the shoulder "because some of it may be duplicative."¹⁵

Dr. Palmgren assessed a 20 percent impairment rating to claimant's right shoulder. Dr. Palmgren provided treatment, including surgery, for claimant's shoulder injury. Dr. Palmgren stated that his main area of focus for treatment was claimant's right shoulder. Dr. Palmgren did not note any symptoms or complaints that would indicate a brachial plexus or sternum injury.

Dr. Stein assessed an impairment rating of 20 percent related to claimant's sternum, ulnar nerve and shoulder. Dr. Stein delineated his ratings as 7 percent whole body for the shoulder, 2 percent whole body for the sternum, and 12 percent whole body for the ulnar nerve.

While Dr. Prostic's rating related to the sternum is not explained very well in the record, he does note pain and popping about the sternum. Dr. Stein also noted pain and popping by the sternum. The cumulative effect of the opinions supports a finding that claimant suffers a permanent impairment related to the sternum.

¹⁵ Prostic Depo. at 5.

Dr. Stein is found to be the most credible witness with regard to the whole body involvement of claimant's impairment. The Board adopts Dr. Stein's findings and finds claimant suffers a 20 percent whole body impairment.

2. Is claimant entitled to future and unauthorized medical care?

In Dr. Palmgren's last clinical note, he recommended a referral to a shoulder specialist for a second opinion. He also recommended that claimant continue with formal therapy. Dr. Prostic vaguely suggested additional testing, including an MRI and EMG. Dr. Stein stated that he would recommend an MRI arthrogram of the right shoulder and an orthopedic consultation.

All of the medical experts contemplate some kind of future treatment for claimant's work-related injury. As such, the Board finds that it is more probable than not future medical, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. Claimant's right to future medical treatment is left open upon proper application, notice, and hearing of the future claims.¹⁶

CONCLUSION

Claimant is entitled to a 20 percent permanent partial whole person impairment as a result of his work related injuries. Claimant does not have a wage loss pursuant to K.S.A. 2011 Supp. 44-510e(a)(E)(i) and is not entitled to work disability. Claimant is entitled to future medical treatment upon proper application, notice, and hearing.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 24, 2013, is modified to reflect the above findings.

The claimant is entitled to 36.11 weeks of temporary total disability compensation at the rate of \$555.00 per week or \$20,041.05 followed by 78.78 weeks of permanent partial disability compensation at the rate of \$555.00 per week or \$43,722.90 for a 20 percent work disability, making a total award of \$63,763.95.

As of September 13, 2013, there would be due and owing to the claimant 36.11 weeks of temporary total disability compensation at the rate of \$555.00 per week in the sum of \$20,041.05 plus 68.60 weeks of permanent partial disability compensation at the rate of \$555.00 per week in the sum of \$38,073.00 for a total due and owing of \$58,114.05,

¹⁶ *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198 (1996).

which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$5,649.90 shall be paid at the rate of \$555.00 per week for 10.18 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority's conclusion that claimant is not entitled to a work disability because he lacked the capacity to enter a contract of employment. On the date of claimant's accident, he did have a valid work visa, and he did have the legal capacity to enter an employment contract. Mr. Masseion testified that given claimant's twenty pound legal restriction, Mr. Masseion would not be able to put claimant back to work even if he had a valid work visa. Ms. Ananda, claimant's immigration attorney, testified that in order for claimant to get a valid work visa, he had to have an employer or a job set up in the United States. When claimant's work visa expired, it was his injury and resulting restrictions preventing him from getting a new work visa.

Claimant's 100 percent wage loss and work disability were caused by his accident and resulting injuries. Had claimant not been injured, he would have been able to renew his work visa because he had a job available with respondent. In essence, claimant lacks the legal capacity to enter into an employment contract in the United States because he lost that legal capacity due to his work injury and resulting restrictions. If the majority's

ruling stands, then an employer could prevent any foreign national with a valid work visa from getting work disability by delaying the claim until the worker's work visa expired.

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